

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 320 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and  
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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MIR FIROZBHAI ANWARBHAI @ FULABHAI AMRUTBHAI

Versus

STATE OF GUJARAT

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Appearance:

Mr.Tirmizi for Mr.P.M.Thakkar with MS BANNA S DUTTA  
for appellant  
PUBLIC PROSECUTOR for Respondent

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CORAM : MR.JUSTICE S.M.SONI and  
MR.JUSTICE J.R.VORA

Date of decision: 18/03/98

ORAL JUDGEMENT (Per Soni J.)

Appellant - accused has filed this appeal against the judgment and order dated 30.3.91 passed by learned Additional Sessions Judge, Mehsana in Sessions Cases No.66/90 and 67/90. Both the sessions cases are

consolidated and evidence is recorded in Sessions Case No.66/90. Learned Additional Sessions Judge has convicted the appellant in Sessions Case No.66/90 and has acquitted him in Sessions Case No.67/90. The learned Additional Sessions Judge held the appellant guilty in Sessions Case No.66/90 under sections 302 and 323 of I.P.C. and passed sentence of R.I. for life for offence under sec.302 and has not passed any separate order of sentence for offence under sec.323 I.P.C.

At the outset, we may say that we are not in agreement with the order passed by the learned Additional Sessions Judge of consolidating two cases. Two sessions cases are not arising from the same incident. Two sessions cases can only be consolidated if they arise from the same incident, but not otherwise. However, as the learned Judge has acquitted the accused in other sessions case, we do not take any serious exception to this order. We, however, put a note to the effect that the learned Additional Sessions Judge ought to have been careful before passing an order of consolidation. This order of consolidation appears to be apiece of order, which reflects non-application of mind on the part of learned Additional Sessions Judge. We may also say that as it does not prejudice either the case of the prosecution or the defence, we do not bother for the same.

On the night of 27th and 28th October 1989, deceased with his wife Dharmaben and two children were residing in a slum at village Veda. They previously resided at village Siola. On 27.10.89, deceased and some of his acquaintance were sitting in the court - yard just chit-chatting and they went to their bed thereafter. At about 11.00 PM, Dharmaben, P.W.3,, wife of deceased, had wake up to feed her suckling child. At that time, accused entered with a sword in her slum quarter and inflicted sword blow on the belly portion of her husband Ishwarbhai, who was sleeping in cot. When Dharmaben shouted, she was also given two blows by wooden washing club. After injuring her, accused ran away. On hearing her shout, her brother-in-law Babubhai, who was residing at a distance of about 20 - 25 ft. came rushing to the slum quarters and he found his brother Ishwarbhai lying injured in the bed and Dharmaben was crying. Dharmaben informed him about the incident. On hearing the hubbub, neighbours gathered and the injured was taken to the hospital in a rickshaw. On the way to the hospital, injured died. However, he was taken to the hospital. It was about 0.45 hours in the morning. At that time, doctor gave varthi to Vijapur Police Station, informing

that dead body of one Ishwarbhai is brought to the hospital, who had injuries on his belly. Thereafter, at about 0.45 A.M. on 28.10.89, Babubhai had gone to Vijapur Police Station and had informed the Police and his complaint was registered. On receipt of the complaint, offence is registered. Investigation was commenced. On completion of the investigation, accused was chargesheeted in the court of J.M.F.C. Vijapur, who, in his turn, committed the case to the court of Sessions at Mehsana.

Learned Additional Sessions Judge, Mehsana framed charge against the accused under sections 302, 323, 504 and 506 (2) of I.P.C. as well as under sec.135 of the Bombay Police Act. Accused pleaded not guilty and claimed to be tried. Prosecution led necessary evidence to prove the charges levelled against the accused. No defence was led in this case. The learned Additional Sessions Judge, on completion of the evidence of the prosecution and after hearing the learned Advocates, passed the impugned order, as referred above.

This appeal was filed by the accused from Jail and, therefore, learned Advocate Ms.Banna Datta is appointed. Accused had also instructed learned Advocate Mr.P.M.Thakkar to file an appeal against the impugned order of conviction. Mr.Thakkar had, therefore, filed Criminal Appeal No.402/91. When the present appeal came up for admission hearing, Division Bench passed an order on 20.12.91 to admit the appeal. Criminal Appeal No.402/91 did not come up for admission hearing, as there was some delay in filing that appeal. Learned Advocate had, therefore, filed Misc.Criminal Application No.3294/91 for condonation of delay of 23 days. When said Misc. Criminal Application came up for admission hearing, it was brought to the notice of the court that Criminal Appeal No.320/91 (present appeal) is filed and already admitted against the very judgment and order, from which Criminal Appeal No.402/91 is filed and condonation of delay is sought. Division Bench, therefore, in view of Criminal Appeal No.320/91 being admitted, did not pass any order on the second appeal. This appeal was placed for final hearing. However, name of learned Advocate Mr.P.M.Thakkar was not shown, as Criminal Appeal No.402/91 was not notified because no orders were passed thereon. In Criminal Appeal No.320/91, this court has appointed learned Advocate Ms.Banna Datta, as none represented the appellant in this case. At the time of hearing, we found that in Criminal Appeal No.402/91 this very appellant has engaged learned Advocate Mr.P.M.Thakkar and his name was not shown, as

appeal filed by him has stood disposed of in view of no orders. However, we thought, in the interest of justice, to call Mr.Thakkar to address this court, as he was already engaged by the appellant. We have also taken assistance from Ms.Banna Datta.

Learned Advocate Mr.Tirmizi for Mr.Thakkar has challenged the conviction mainly on the ground that the prosecution has failed to establish the identity of the accused beyond reasonable doubt. He also contended that there is no evidence worth the name to link the accused with the commission of crime. He also contended that there are no circumstances to corroborate the say of Dharmaben, wife of deceased, who claims to be an eye witness. Mr.Tirmizi, therefore, contended that in substance this is a case of no evidence against the accused and the learned Additional Sessions Judge has erred in convicting the accused. As we are convinced with this contention, we do not propose to enter into any other contentions raised by the learned Advocate for the appellant.

Incident took place at about 11.00 PM on 27.10.89 in the slum quarter of deceased Ishwarlal, with whom his wife P.W.3 and two children were residing. At 11.00 PM Dharmaben, P.W.3, had wake up to feed her suckling child. At that time, according to her, accused came with sword in the house, gave sword blow on the belly of Ishwarlal. When she shouted, she was also given two blows with washing club. When she shouted, her brother-in-law had rushed to her quarter and she informed him that Fulabhai had given sword blow to his brother and she was also given two blows with washing club. According to her, light was on in her quarter; street light was on and light on the pole outside the quarter was also on. On the basis of the information conveyed by P.W.3, Babubhai P.W. 2 had gone to Police Station and the complaint is lodged, which is Ex.22 on the record. If we read Ex.22, it does not disclose the name of the accused. In that complaint at Ex.22, P.W. 2 has stated that his brother's wife told him that a person with a white pant and a banyan had assaulted his brother and run away and she was also given two blows with washing club. Name of the accused was not disclosed in that complaint. However, in that very complaint, it is stated that one Prajapati Somabhai had stated that Fulaji Mir had hide himself with a sword in his hand in a corner near his shop and was telling to a boy that he had come to assault one Rahim. He has expressed a doubt to the effect that said Fulaji has killed his brother, instead of Rahim. This is how the name of accused Fulaji is disclosed. Admittedly,

name of the accused is disclosed as a suspect. Dharmaben P.W.3 in her cross-examination admits that she knew the name of the accused on the day of the incident. Despite this fact, she has not disclosed the name of the accused to her brother-in-law Babubhai P.W.2. Unfortunately, in the court of sessions, accused was represented by an Advocate under legal assistance, as the accused was undefended. We do not know the standing of the learned Advocate appointed before the trial court, but it appears that he may not have much experience about the criminal trial. We infer so for the reason that certain contradictions are not brought on record by the said Advocate. It appears that the story advanced by Dharmaben P.W.3 before the court no doubt is the same, as that was before the Police, except the name of the accused. When P.W.3 admits that she was knowing the name of the accused on the day of incident, there was no reason for her, not to give name of the accused to her brother-in-law, who, in his turn, would not have failed to disclose the name before the Police in the complaint. On the contrary, in complaint itself, it is suggested that the name of the accused is only a suspicion because on enquiry of some boy, accused replied that he had come to kill Rahim. Apart from this, assuming this fact to be true, then also accused had not gone there to kill Rahim and there is no circumstance to show that accused was there at the relevant time. Accused in the instant case is arrested on 17.12.98, practically two months later. Apart from this, say of P.W.3 that there was a light on in her quarter; there was a light on in the street; there was a light on a lamp post opposite to her quarter, is contradicted by the evidence of other witnesses. Gandabhai P.W.7 has admitted that there was no light on the pole where he was sitting with the deceased before the incident. In the cross-examination, he has admitted that near the scene of offence, there was total darkness. However, he admits that darkness was such that persons can be identified. Mohanbhai P.W. 5 on hearing the shout of P.W.3 opened his window and he saw one man going away. Accused is an ordinary resident of that village and is known to villagers. If accused was the person who was seen by P.W.5 going away with white pant and a banyan, there was no reason for him not to disclose his name to the Police. No doubt, before Police, he has given the name, but he has turned hostile. It is surprising that everyone says that they saw a man with a white pant and a banyan going away, but no one has given the name of the accused and the name of the accused admittedly is referred in the complaint only as a suspect. Therefore, evidence of P.W.3 cannot be relied upon in absence of any other independent corroborative

piece of evidence.

In the instant case, there is no independent piece of evidence to corroborate the say of P.W.3. Sword is found lying in the field of one Somabhai, whose daughter when went to the field to collect grass, found the sword lying in the field. The sword appeared to be stained with blood. However, as per the F.S.L. report, there was human blood, but the group cannot be ascertained. Simply because a sword is found from the field of someone, which was stained with human blood, that by itself cannot be said to be the sword of the accused, much less used by the accused in the commission of the offence, in absence of any evidence to link between the two facts. There is no evidence on record to show that said sword belonged to the accused; nor it is the accused who has thrown away that sword in that field. No other circumstance is found to show that the person with white pant and banyan was accused and accused alone. In view of this fact, prosecution has failed to prove beyond reasonable doubt that it was the accused who has inflicted sword injury on the deceased. Accused is, therefore, entitled to benefit of doubt.

In the result, appeal is allowed. Judgment and order of conviction and sentence is set aside. Appellant - accused be set at liberty, if not required in any other case.

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